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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THOMAS MARSHON STINE, Defendant and Appellant.	A133781 (San Mateo County Super. Ct. No. SC071244)

Thomas Marshon Stine was tried by jury before the Honorable Barbara J. Mallach on a felony count of possessing marijuana for sale (Health & Saf. Code, § 11359).[1] The jury found Stine guilty, apparently rejecting his medical marijuana defense offered under the Compassionate Use Act of 1996 (CUA) (§ 11362.5). At sentencing, Judge Mallach suspended imposition of sentence and admitted him to three years probation with a six-month jail term condition and, over defense objection, a condition that he abstain from use and possession of controlled substances, including marijuana.

Stine did not appeal that judgment of August 23, 2011, but later requested modification to allow his medical use of marijuana. Judge Mallach heard the matter on October 28, 2011, and denied the request. Stine filed a notice of appeal on November 14, incorrectly indicating that he challenged a plea-based judgment, but clearly and timely identifying the modification denial of October 28 as the challenged order.

[1] All undesignated further section references are to the Health and Safety Code.

Stine's appellate counsel filed a *Wende* brief raising no issues and seeking our independent review (*People v. Wende* (1979) 25 Cal.3d 436), and this court, after a preliminary review, ordered the parties to brief whether denial of the modification request was an abuse of discretion. Having now considered that briefing, plus supplemental briefing on the effect of our intervening decision in *People v. Leal* (2012) 210 Cal.App.4th 829 (*Leal*), we find no abuse of discretion and affirm the denial.

BACKGROUND

By the time Judge Mallach denied modification, she had heard the trial and original sentencing evidence, as well as the evidence at the modification hearing. We accordingly summarize all three sources of information.

Trial Evidence

Prosecution case. Shortly before noon on March 9, 2010, Detectives Christopher Sample and Nicholas Douglas of the Menlo Park Police Department, patrolling in East Palo Alto in an unmarked Chevy Tahoe, as members of a narcotics task force team, saw three men sitting in a minivan on Cypress Avenue, a dead-end street in a high narcotics area. The officers stopped, got out, and approached the minivan, Douglas on the passenger side. Stine sat in the driver seat, and the others sat in the front passenger seat, and a row of seats behind. Sample noticed an odor of burnt marijuana, and smoke wafted out when Stine opened the driver side door. Sample asked Stine if he had any marijuana in the van, saying he could smell it, and Stine said he did. One passenger, a Black man Sample knew as Anthony Lewis, exited the van and tried to leave, but complied when Sample told him to come back. Sample asked Stine if he had anything in the van besides marijuana, and Stine said no. The officers got drivers' licenses and identification from each suspect and eventually had them leave the van and sit on a curb. Douglas provided cover while Sample investigated and collected evidence. Stine resided in San Mateo.

In searching Stine, Sample found money in a pants pocket, an expired cannabis card issued in February 2004, and discovered that Stine was wearing a bulletproof vest under his T-shirt and jacket. That type of ballistics vest would typically cost $700, was

specifically designed to stop handgun rounds, had a special trauma plate in the center to stop assault rifle rounds, weighed from 10 to 15 pounds, and would be uncomfortable (hot and itchy) to wear. Sample alerted Douglas to the vest, which increased Sample's expectation of encountering a firearm or other danger. In a search of the van, Sample found in a center console ashtray a blunt (marijuana cigar or cigarette) the occupants had apparently been smoking and an ounce of marijuana, plus a digital scale in a pocket in the driver's side door. Behind the driver's seat was a black bag containing eight more one-ounce sandwich bags of marijuana.

When the men with Stine asked if they were going to be arrested, Stine interrupted to say the marijuana was his, that he purchased over half a pound of it from somebody in San Mateo earlier that day for $1,825, that he was going to split it with someone who was to arrive later, and that none of it belonged to his companions, although he did say that Lewis had paid him $5 for some and that the other man (Wagner) was going to wash his car for some. Stine was arrested, and the other two were released at the scene.

At the police station, Stine gave a *Mirandized* statement (*Miranda v. Arizona* (1966) 384 U.S. 436) in which he said he had lied about splitting the marijuana with someone else. Both officers recalled Stine mentioning that he had ulcerative colitis, and Sample recalled Stine saying that he smoked marijuana to address the condition.

Agent Daniel Guiney of a county-wide narcotics task force opined from the circumstances, as an expert in the possession of marijuana for sale, that Stine had the marijuana "both for personal use and for sale." He explained that people who personally use marijuana often buy in larger quantities than they need and use a digital scale to sell off smaller portions, thereby profiting and availing themselves of bulk prices. While individual use varies, most people ingest half a gram per use, perhaps up to one and a half grams depending on the kind and quality, and whether the marijuana is properly trimmed or cured. At 256 grams per ounce, each ounce could furnish about 500 uses. The number of uses per day varies, but even higher-quantity users smoke only an eighth of an ounce per day. Stine therefore had enough for two months at that rate, or one month if the daily

amount were doubled to a quarter ounce—a level Guiney had heard of but never encountered.

Guiney's opinion that most of the drug was possessed to be sold rested on the full circumstances, including: Stine's statements; his expired cannabis card; the packaging into one-ounce bags; the bag in the console having been "dipped into" for use by Stine and/or his companions; the digital scale that served no purpose except to weigh out small quantities for sales to others (since users ordinarily do not weigh what they use); the bulletproof vest, which he had never seen worn by a mere user as opposed to a dealer; and the marijuana having been purchased close to home, in San Mateo, and taken to the drug sales area in East Palo Alto (by someone wearing a bulletproof vest). The risk of being robbed increases with the amount of anticipated profit, and one who paid $200 an ounce for the drug could sell it in more profitable smaller quantities for $400 an ounce. The digital scale in this case was small (Detective Sample having had a one-ounce bag fall off the scale when he tried to weigh with it), but it is common for small amounts (like a "dime bag" of $10 to $20 for a gram) to be taken from a larger amount and weighed out on a small scale like that. Guiney knew of nothing in the law that allowed medical marijuana to be sold to or shared with others.

Defense case. Dr. Hany Assad testified that he examined Stine in February 2004 and wrote him a recommendation for medical use of marijuana. This was work he did at the office of two physicians in Oakland, separate from work he did at Kaiser Permanente (Kaiser). He did not have records beyond his recommendation and could not say whether he reviewed Stine's medical records before recommending marijuana, but recalled Stine complaining of stress, anxiety and abdominal pain. He did not recommend a particular dosage. He was a licensed physician at the time but on probation and unable to treat female patients given medical board action on complaints by three female patients of sexual assaults. His medical license was later suspended for writing medical marijuana recommendations without proper assessments and examinations. Assad characterized the women's complaints as made up and the product of psychiatric problems, and he

attributed some disciplinary problems to "bad handwriting." He was vigorously impeached on those explanations with records of the proceedings.

Stine testified, presenting a CUA defense that, the cold record suggests, left the jury convinced that Stine was tailoring his version of events to fit the defense and patch over incongruities. He said he left his San Mateo home that morning around 10:00 a.m. and bought the marijuana from a man in San Mateo he had met with in person the night before, a man who grew marijuana and had sold it to him twice before. Refusing at first to identify the man, Stine eventually said it was someone named "Dave," but gave no last name. He had met Dave at a recreation center near his home.

The bulletproof vest, Stine said, had been loaned to him months earlier by a "friend" or "acquaintance" who was looking out for his safety, a man with whom he played basketball, and who used to stay in San Mateo but had moved to Hayward. Refusing initially to identify this man either (saying "I plead the Fifth"), Stine said eventually that his name was "David." He did not know the last name but clarified that this was not the "Dave" from whom he bought the marijuana. The vest was a loan, and while he did not know where David lived, he could get in touch with David since he was "around San Mateo" a lot. Stine had no idea the vest was expensive, but David had never returned for it.

Stine said he had worn the vest only twice before and did not always wear it to buy marijuana. He did that morning, however, for his "safety," and only because he was buying the drug, not because he was going to distribute it in East Palo Alto. He was not going to split the marijuana with anyone, and his initial statement to that effect was a lie he told police because he was "nervous." He bought the nine ounces in order to get a cheaper price than he could with one-ounce buys. Asked why he needed the vest when he was buying from a friend from whom he had bought twice before, Stine said it was because of the large amount of money and the drug. He said, without giving any factual context, that he had been shot before and "stabbed on different occasions." Asked why he kept the vest on when he went to East Palo Alto, he said he "[j]ust never took it off," and that wearing it was not uncomfortable or heavy to him (at six feet tall and 148

pounds). He never thought of leaving the vest and nearly $1,800 worth of marijuana at home before going to East Palo Alto.

Stine said he was driving a borrowed car, and went to East Palo Alto to get it washed before returning it. He also said he conducted "family affairs" in East Palo Alto, caring for a grandmother there while his mother worked and picking up his children from school in Palo Alto. He "most likely" would have dropped off his vest and marijuana at his grandmother's house before picking up the children, so as not to take those things to their school. His grandmother understood his illness, understood what he did, and was "okay with" him "helping [him]self." He did not know why he did not drop the items off right away, but instead, he went to get the car washed. The man who was to wash the car came to speak with him, got into the car, and joined in smoking marijuana with him. The other man put down $5 as he got in and said " 'Here's $5' " before smoking with them. But Stine said he never asked for the money, was not going to accept it, and that "[n]othing changed hands." The men knew only of the ounce he had in the center console and were unaware of the other half pound in the closed black bag behind his seat. Stine said he could have contacted them, and David, to testify on his behalf, but saw "no reason" to bring them in.

On his possessing the digital scale, Stine explained that he measured his one-gram doses in order to conserve his marijuana. Also, Dave had instructed him to bring his scale that morning to measure the marijuana because his own scale was broken. Given that the scale was small, they measured out the drug in one-ounce bags, and he said that Detective Sample was wrong about the scale being too small to weigh out a whole ounce; it could be done if one tied the bag tightly.

Stine explained that he used marijuana for relief from ulcerative colitis, from which he had suffered since 1999, improperly diagnosed for the first several years. His symptoms were fatigue, weight loss, abdominal pain, and frequent bathroom use. He got the medical marijuana recommendation from Dr. Assad in 2004, after trying marijuana, and after having used prescribed medicines that made him sick. Dr. Assad was not his regular doctor. Renewing the physician recommendation and cannabis card would have

cost $160 to $170, and he let his cannabis card lapse because of financial difficulties. He lost his job and medical coverage in 2006 or 2007. Dr. Assad had not prescribed a dosage, but Stine said that he used four to seven or eight grams a day at the time of his arrest, meaning that the nine ounces he bought would have lasted one to two months. His treatment cost about $900 a month, which would total $10,800 a year except that Stine grew marijuana outdoors, and used his own between April and September each year. He was not working but had been wrongfully fired from Stanford University and, in late 2008 or early 2009, received a settlement of about $47,000 or $48,000. Stine had recently seen Dr. Lucido, who had examined his medical records and given Stine a renewed recommendation for medical use of marijuana.

As a matter of general impeachment, Stine admitted that he had a drug-related felony conviction of moral turpitude from when he was 19 years old.

Dr. Frank Lucido testified as an expert in the diagnosis of illness and treatment with marijuana, and evaluating other physicians' performance. He had served on the advisory committee of NORML (National Organization for the Reform of Marijuana Laws) and advocated legalization of marijuana. Sixty percent or more of his practice related to cannabis, as opposed to family practice, and he had been voted Best Cannabis Physician, in 2009, by the readers of the East Bay Express. He explained ulcerative colitis as a chronic bowel condition marked by episodes of active inflammation, and other times no symptoms. It involves periodic worsening of symptoms of abdominal pain, nausea, and often diarrhea, and can be "quiet or . . . very painful," depending on the patient and the severity of the disease at any given time. It may worsen over time, but "often it's a matter of ebbing and flowing," and the illness can be properly treated with marijuana. Given that the disease is chronic, the appropriateness of a recommendation for medical marijuana, he felt, did not lapse with the authorization period, and a recommendation may be renewed after such a lapse. The CUA did not authorize patients (as opposed to qualified caregivers) to share their marijuana or sell it to others.

At the request of defense counsel, Lucido evaluated Stine on June 1, 2011—three weeks before testifying. He reviewed Stine's medical records from Kaiser and Redwood

City Medical Center, examined him, and found that "bowel sounds were decreased, but present and [that] the abdomen was soft and not tender." Lucido found that Stine had recurring abdominal pain due to ulcerative colitis and recommended treatment with marijuana. The recommendation, he felt, was proper even though Stine was asymptomatic at the time. Lucido also reviewed the case in which Dr. Assad's license was revoked, agreed that Assad's practices were outside the norm for medical cannabis evaluations, and did not rely on Assad's 2004 evaluation. Nevertheless, he determined that Stine had the same illness back then, and opined that Stine had the same condition and was properly using marijuana for treatment at the time of his arrest in March 2010. Stine reported using about two ounces a week, but Lucido did not know the THC content of what marijuana Stine had or how it compared with the drug in a federal study he cited where patients had used similar amounts. The California Medical Association advised against making recommendations for specific amounts, and Lucido did not do so. Also, his evaluations of how much a person needs from year to year were, he said, "based on what the patient tells me." What is reasonably related to one's medical needs, he testified, could be as little as a gram a week to two ounces or more a week, and he felt that some patients did weigh their marijuana doses, although they would "get used to what a gram is" and not need to weigh it out every time one smoked.

Rebuttal case. Detective Sample testified, in response to Stine's account of the police encounter, that Stine never mentioned using his scale to weigh out his doses, and did say that both men in the car were getting some of the marijuana (one for $5 and the other for washing the car). Sample reiterated that Stine said he was going to split the marijuana with someone else, only to change his story at the police station.

Sentencing Evidence and Positions

The sentencing report recommended probation conditioned by Stine serving six months in jail and not using or possessing controlled substances, including marijuana. His prior drug-related conviction was for possessing cocaine base for sale, and he had two other convictions, both misdemeanors. Defense counsel Naresh Rajan urged the court to allow CUA use of marijuana, perhaps with possession limited to two ounces, and

said he had asked Dr. Lucido to testify further about marijuana being "an appropriate remedy" for Stine's affliction (although the doctor was not there).

No further testimony was ultimately given, but discussion revealed the judge and parties' thinking at that point, starting with lack of information from any jury about what exactly caused the jury to reject the CUA defense. But after Stine declined an invitation to speak, Judge Mallach confided to him: "I think what I found during the trial was that it was incredibly bizarre that you were wearing a bulletproof vest. That made no sense whatsoever except, I mean, in your theory of things. It made a lot more sense in the prosecution's theory of things. So I agree with [Deputy District Attorney Sean] Dabel in the sense it's kind of hard to accept your version of the situation." Asked about hearing from Lucido, the judge led this exchange: "THE COURT: I mean, if he's going to add anything. I didn't have any quarrel with the underlying premise that the defendant was prescribed the marijuana. What I really thought though and would think is that yes, he was prescribed the marijuana, but then he decided hey, I got a good thing going here. I'm going to make some money and maybe a little business. That's my analysis of it. So—but if you wish to have Doctor Lucido testify, that's fine. [¶] . . . [¶] I mean, I guess the bottom line with regard to [allowing CUA use] is I would want to know is there any—what's the alternative? Clearly, there are a lot of people who have this disease who aren't smoking marijuana.

"MR. RAJAN: Right. The alternative is standard medicine; the Vicodin[]s; the narcotics. The problem with these medications with regard to Mr. Stine is that they're not really working. I think it's a unique situation with regard to him. It's an individualized kind of situation. He seems to react very badly to traditional medications and seem to be receiving a lot more—

"THE COURT: How do we know that other than his testimony?

"MR. RAJAN: That's how I know it.

"THE COURT: Well, I would want something a little bit more than that because I think we end up in a [C]atch 22 situation. And we also end up with the probation

department not being able to monitor that so that's my concern. [¶] . . . [¶] How do we know he's not, for example, doing exactly what he was doing here?"

Dabel then commented: "[I]t's really difficult for the People to submit that based on the defendant's testimony that this is the only type of treatment that he can get. It's apparently a very expensive treatment; the amount of marijuana he's smoking. It's hard for the People to believe there's no other treatment in the same price rang that's going to alleviate his [e]ffects because he has been shown to possess it for the purpose of sales . . . ." Rajan replied: "Mr. Stine's wife . . . could probably shed some light on his symptoms. The problem is that nobody who isn't really close to Mr. Stine has the basis to know whether or not the medication is working and whether or not he needs marijuana. Problem is with his own self-diagnosis as far as his pain, only he can testify to what he's feeling and so."

The court acknowledged the problem, also suggesting that Rajan might want to find a witness "a little bit more down the middle to testify that this is . . . the preferred treatment," given that Lucido had "a philosophical point of view that is maybe not mainstream." Rajan conceded that "thousands of people all over the United States are being treated" for ulcerative colitis without using marijuana, and submitted on the report without presenting further evidence. The court suspended imposition of sentence and granted probation on the indicated conditions, including that Stine abstain from use or possession of marijuana and submit to chemical testing as directed by any peace or probation officer. Stine has not appealed that judgment of August 23, 2011.

Modification Hearing Evidence

Stine brought a motion to modify his sentence (Pen. Code, § 1203.3 [general court authority to modify anytime during probation]; § 11362.795 [specific authority to modify for CUA confirmation, on probationer's motion]), and the motion was heard and denied after testimony and argument on October 28, 2011 (all unspecified further dates are in 2011). It is this post-judgment ruling that Stine appeals.

The motion was in two parts, one for medical use of marijuana during probation, and the other for electronic home monitoring. At his August 23 sentencing, Stine had

been given a September 24 surrender date, had now served nearly five weeks of his six-month term, and anticipated, given conduct and work credits (Pen. Code, § 4019), serving just half of the six months. His motion did not seek medical marijuana use while in jail, but, citing weight loss and heightened symptoms since incarceration, sought release on electronic home monitoring for the remainder of the jail term and, thereafter, for the rest of probation. As we understand his appellate briefing, Stine challenges the denial of medical marijuana but not the denial of electronic home monitoring, which must surely be moot by now.

Stine did not testify himself, or call Drs. Assad or Lucido for further testimony, but he presented a third physician, Dr. Jeffrey Hergenrather, who testified as an expert in both cannabinoid medicine and traditional medicine to treat ulcerative colitis and other inflammatory bowel disease. Hergenrather had practiced since 1975, mostly as an emergency room physician but, for the last 12 years, as a specialist in medicinal use of cannabis within a general practice context. A member of several cannabis-related organizations, he was president of the Society of Cannabis Clinicians, had completed two studies of patients with ulcerative colitis and Crohn's colitis, and had recently reported his findings at the University of Bonn, Germany, to the International Association for Cannabinoids in Medicine. On Stine's motion, we have augmented the appellate record with a printed PowerPoint presentation by Hergenrather that was lodged below for the judge's perusal during the doctor's testimony. There is no need to detail its contents here, for in the end, Judge Mallach accepted its thesis that marijuana can effectively relieve the symptoms of ulcerative colitis, alone or in combination with traditional medicines—in the judge's own words, "maybe . . . better than the traditional medicine." The judge's misgivings went to matters specific to Stine's own treatment history, and his motivation.

Further on in this opinion (pt. II, *infra*) we detail the evidence on those matters, and the ruling. It is enough here to state that, while the evidence showed that Stine had suffered for years from an ebb and flow of symptoms of ulcerative colitis, did claim significant relief from marijuana he had used in the past, and did claim a worsening of his

symptoms since being incarcerated, Judge Mallach was ultimately skeptical of his credibility and his motivations for seeking modification. Also, many of the facts asserted in the motion were not supported by evidence. Judge Mallach denied modification.

DISCUSSION

Leal announced "a three-step inquiry into limiting CUA use of marijuana by a probationer. First, we examine the validity of any CUA authorization; second, we apply the threshold *Lent* test [(*People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*))] for interfering with such authorization;[2] and third, we consider competing policies governing the exercise of discretion to restrict CUA use." (*Leal*, *supra*, 210 Cal.App.4th 829, 837.) As will appear, this case turns on step three of the inquiry. But first, we address some uncertainty about Stine's appellate arguments in the wake of *Leal*.

I. *Issues Resolved by* Leal

Stine's original briefing raised several arguments that our opinion in *Leal* resolves against him. We granted Stine leave to file a letter brief on the impact of *Leal*, and have received as well a response by the Attorney General, and a reply by Stine, but Stine's supplemental briefing leaves unclear whether he accepts *Leal*'s holdings on his initially briefing. He neither repeats nor adds to them, but he does not expressly concede or withdraw them, either. So out of caution, we briefly repeat and adhere to the pertinent holdings in *Leal*.

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[2] "Under the *Lent* test and settled review principles: 'We review conditions of probation for abuse of discretion. [Citations.] Generally, "[a] condition of probation will not be held invalid unless it '(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .' [Citation.]" [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. [Citations.] As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality. [Citation.]' [Citations.]" (*Leal*, *supra*, 210 Cal.App.4th at p. 840.)

Much of Stine's briefing centers on section 11362.795, a provision in the Legislature's Medical Marijuana Program (MMP) that allows probationers like himself to seek court confirmation of CUA authorization. He argues that the section, when properly read, does not authorize a court to go beyond a facially valid CUA authorization and deny confirmation based on the *Lent* test; alternatively, he argues if the provision can be read that way, it constitutes an unconstitutional restriction by the Legislature of a voter initiative, the CUA. We rejected those arguments in *Leal*, holding in essence that a trial court's long-established power to ban otherwise lawful activity under the *Lent*-test is inherent, not dependent on authority conferred by the CUA or the MMP, and that neither enactment explicitly or implicitly terminates that power. (*Leal*, *supra*, 210 Cal.App.4th at pp. 846-849.)

Stine also argues that survival of the *Lent* test in this context renders section 11362.795 (or modification under Pen. Code, § 1203.3) "illusory" and impermissibly allows a trial court to second-guess voter intent and the opinion of an authorizing physician. Not so. We held in *Leal* that the third-step inquiry means that a court finding both CUA authorization and satisfaction of the *Lent* test cannot automatically deny confirmation; it must go on to balance the competing public policy interests. (*Leal*, *supra*, 210 Cal.App.4th at pp. 843-844.) This exercise of discretion also does not constitute a prohibited second-guessing of voters or physicians (*id*. at p. 844), a prohibition more properly invoked during the step-one inquiry into valid authorization (*id*. at p. 839). Stine argued in his initial briefing that the *Lent* test, usually applied at an initial grant of probation, should not apply to post-judgment motions to modify, but we cannot share his view given that the same competing interests arise in both situations.

Stine invokes language in *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1444, broadly suggesting that prohibiting CUA-authorized use of marijuana serves no rehabilitative purpose. We examined that language in *Leal*, found it to be dictum, and disagreed, in any event, with the notion that prohibiting CUA use cannot serve a rehabilitative purpose. (*Leal*, *supra*, 210 Cal.App.4th at pp. 849-850.)

II. *The Evidence and Step-Three Balance of Interests*

Applying *Leal*'s three-part inquiry to the facts of this case, the parties agree that the step-three balance of interests is determinative. Judge Mallach implicitly accepted that Stine had a valid physician's recommendation by the time of the hearing, whether from Drs. Lucido or Hergenrather, or both. Stine also concedes in his supplemental brief "that—due to his underlying conviction for possession of marijuana for sale—the trial court did not abuse its discretion under the traditional *Lent* standard when it refused to modify the challenged probation condition." We therefore proceed to step three.

Evidence and arguments. Stine's trial counsel, Rajan, imparted urgency at the start of the hearing by saying that, while he had of course seen Stine during trial: "I was quite shocked to see him in custody about a week ago. He has lost a lot of weight and he is in a great deal of pain." Rajan said Stine had been taking medication in jail for the past week but, for his first month there, "refused to take" any, feeling that he would have "other symptoms and problems with those medications" and so was "racked with pain"—"bent over." Rajan said conventional medications "did a number on his system," adding: "And as you can see, he has lost about 20 pounds with the use of the medications. He's been suffering an allergic reaction; he reports a cyst under his arm that's getting bigger and he's had hives." As it developed, however, most of those unsworn representations lacked support in the record and the testimony of the sole witness, Hergenrather.

The amount of weight loss was never fixed by the evidence and was not tied causally to marijuana, which Stine had apparently not used for months. Hergenrather testified that he believed Stine had been on "a hiatus" from marijuana at the time he examined him. On the matter of weight loss, we have the testimony of Stine at trial, on June 20, that he weighed 148 pounds. Hergenrather testified at the hearing that, when he examined Stine at his office on September 22, two days before Stine began serving jail time, Stine "weighed 151 pounds and he looked lean for being 5-foot-10 and a half, but in reasonably good health at the time." He was asked on cross-examination: "You would expect that if the absence of marijuana was really the determinative factor in his health, that you would see a substantial weight loss in a month [since his August sentencing] I'd

have to imagine; right?" and conceded, "That could be." Later, during argument, Stine's counsel stated that Stine had told him he now weighed "136 pounds," but this was never *shown by evidence*. The transcript indicates that Hergenrather held up, for the judge to see, a photograph he said he had taken of Stine on September 22, but the photograph was only *marked* as an exhibit, not admitted in evidence, and is not in our appellate record. Even if we had the image before us, we have no image from the *hearing* with which to compare it. Hergenrather testified, displaying the photograph, that Stine "looked to me to be weighing a little—at least a little bit more than he does now. His facial features have changed somewhat." The record thus leaves us unable to quantify the weight loss, except to infer, first, that Hergenrather, a physician, did not seem to think it was a serious amount, and second, that Rajan's statement "about 20 pounds" had to be exaggeration.

The premise that Stine suffered from ulcerative colitis was, as at trial and sentencing, undisputed, and the judge made a statement that it was documented. Hergenrather reviewed medical records that, Rajan represented, were the same ones used by Dr. Lucido at trial, and they included a colonoscopy done on Stine a month before trial. The records were not introduced at the hearing, but Hergenrather opined that the records, together with his examination of Stine, showed ulcerative colitis—albeit misdiagnosed for several years as pancreatitis. Stine had reported "nausea and vomiting and marked loss of appetite and a marked degree of pain. Most of his emergency room presentations were with abdominal pain and that is typical of this pancreatitis diagnosis as well so I think it was understandable . . . that he was repeatedly diagnosed with pancreatitis; but in fact, he was suffering from pain from inflammation, not of the pancreas, but in the colon." A biopsy from the colonoscopy showed "moderate chronic active colitis with ulceration . . . ." Having seen Stine just once, Hergenrather found it "a little bit difficult" to rate the severity of his colitis, but called it a "significant disease," with "worse than average conditions," and rated it as "about an eight or nine" on a scale of one to ten.

Stine's heightened discomfort by the time of the hearing was better shown, but again, not to the degree represented by his counsel, and it can be argued that there was

actually no *evidence* of what drug he had taken during his last week in custody. His counsel, Rajan, *stated* that he had just spoken with Stine, who said it was Mesalamine, but that statement was unsworn. There was no stipulation to that effect, Stine himself never testified, and Rajan's statement was evidently news to Hergenrather. Judge Mallach followed up by asking Hergenrather if he knew *the last time* Stine may have been on that drug, and whether he was on it when Hergenrather examined him. Hergenrather gave no information about the "last time," but did say of the examination, "I don't believe he was [on it] at the time." Thus we do not have evidence of what drug Stine was taking.

Even if we could say it was Mesalamine, there was no evidence of *how much* of the drug Stine was taking, whether it was an appropriate dose, and whether any claimed ill effects could be attributed to it. And on the subject of ill effects, there was *no evidence* that, as Rajan stated at the start of the hearing: "He's been suffering an allergic reaction; he reports a cyst under his arm that's getting bigger and he's had hives." No one so testified. Nor was there evidence for Rajan's statement at argument that Stine was "experiencing extraordinary side effects." The matter was so poorly presented that we can only speculate as to any of those matters.

Stine's *past* use of conventional drugs was also never settled. Hergenrather determined, partly from medical records but also largely from things that Stine *told him*, that conventional drugs had been ineffective. When questioned about relying on Stine's self-reporting, Hergenrather conceded that, in forming his conclusions, he had to rely on what Stine, or other patients, told him. Asked whether, beyond Stine's "word," he had "any documentation that he has been prescribed these medications," Hergenrather said: "I would have to review the records that I have in my folder and see what he was prescribed at the time of his visit. I don't remember the answer specifically. I know he's been given a lot of pain relievers and a lot of antibiotics over the course of this emergency room visits. But as far as going home with a prescription for an immune-modulating drug, . . . the classic drugs used in ulcerative colitis, I'd have to review the records to say for sure." Later, following a recess during which Hergenrather examined

the medical records he had brought to court, he told Judge Mallach: "I don't think I can be of any more help today. I do have some records electronic—in electronic form at the office. These records are from 2000 until 2005 and more recently when Doctor Rubenstein consulted with the defendant on May—in May of 2011." He did not know what Dr. Rubenstein's treatment plan was. Returning to the court's earlier question about when Stine last used conventional medication, Hergenrather said that Stine did not tell him: "He simply said that it was a previous prescription and I don't know when it was stopped so I don't have that information." No further review apparently took place during the presentation of evidence, and Judge Mallach declined, after ruling on the motion, a tardy suggestion by Stine's counsel to "reconsider" after being presented with a documentary history.[3] No claim of error in that regard is raised.

Hergenrather testified, nevertheless, that Stine reported to him having tried Mesalamine (brand named Asacol), upon which Deputy District Attorney Morris Maya interjected: ". . . I have no objection to the doctor testifying to this information as the basis for his opinion, but not for the truth of the matter. I'm not convinced." The judge ruled, "Okay. That will be the understanding then." Hergenrather went on to say Stine told him he had "tried five different traditional medications. He named Asacol . . . . That is probably the most commonly used probably [ex]cepting Prednisone steroids. I think 58 percent of the patients in my study group have used or are using this particular

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[3] The transcript, as excerpted, shows this exchange: "THE COURT: . . . I have not seen a pattern [of trying conventional drugs][;] that's why I asked the doctor about the history of whether the medication he's taken—if I'd seen a history of somebody who's literally gone though all of the medications and hasn't received relief from any of them, then we'd be [in] a different situation. That's not what I'm seeing. [¶] . . . [¶] . . . Motion is denied. Thank you.

"MR. RAJAN: I'm sorry. One last thing though, your Honor. Would the court reconsider if it was presented with a history? I have a box of documents.

"THE COURT: You can always make a motion to modify.

"MR. RAJAN: Okay.

"THE COURT: I don't want to hear the same arguments again and again.

"MR. RAJAN: Of course."

medication in helping manage this condition." But Stine told him that Asacol was not working: "[H]e didn't know why it wasn't working. He did say that it just was not working. He was still having bloating, cramping, pain, nausea, vomiting, and frequent stools; as many as a dozen stools a day in the morning hours." Hergenrather did not recall "any other side effects" (*sic*).[4] Stine "had been intolerant of conventional medications or he simply did not feel he got relief from" them, "so that was part of my finding at the time [of examining him]." When asked what "problem" or "complaints" Stine had with conventional medications, Hergenrather said, "Mostly *that they didn't work* is what he explained to me." (Italics added.) "He explained that experimenting with Cannabis, he had found marked relief of pain and nausea. He still has a little bit of vomiting as some of the patients do in my experience, but he finds that if he does vomit, it actually gives him some sense of relief by emptying his stomach and he doesn't continue to vomit, which he was doing on conventional medications. He found that the Cannabis did ease his nausea, help his appetite, and reduce his pain."

During the examination, Hergenrather said, Stine reported marked tenderness in his middle to lower abdomen when pressed, and Hergenrather deemed marijuana to be "an excellent medicine" for him—his "best drug of choice." He explained how the drug works in the body's "endocannabinoid system": "We have receptors in our bowels, in our brains, and really throughout our body. In specific locations where the marijuana molecules, THC and the other cannabinoids, activate these receptor sites; and in doing so, have a down regulating effect, an anti-inflammatory effect on both the immune system and the nervous system." "THC, the dominant cannabinoid in Cannabis, gram for gram is a more potent anti-inflammatory chemical than Prednisone . . . ." The best effect comes from "small frequent use of Cannabis. If you were smoking Cannabis, it would be a toke or two if I may speak of it that way; every hour or two. The active ingredients only last in the bloodstream about an hour and they rapidly are metabolized into the inactive metabolites, which persist in the body for weeks and weeks. But the active

[4] While the transcript language does not always do so, we must distinguish, of course, between a drug *failing to alleviate symptoms*, and one having *harmful side effects*.

ingredients are very short-lived." Based on what patients told him, daily users of marijuana to manage the disease averaged three grams a day, and those who also used conventional medications averaged 1.7 grams.

Patients using both forms of treatment also sometimes opt for one over the other exclusively. He could not say for sure whether some who opt for just marijuana do so because of the drug's "euphoric effect." He acknowledged some overuse of the drug, including excessive recreational use, but did not "see that as a problem." Questioned by the court with regard to Stine specifically and the fact that he had two convictions for selling drugs, Hergenrather said that, since Stine's symptoms fit the disease, he proceeded as if "dealing with a man with a disease rather than a man with another motive." He drew his conclusions based on Stine's "self-reporting" but did not feel there was "any significant compelling reason other than" the disease for Stine seeking a marijuana recommendation. Doctors in the "marijuana industry," he also explained, "have recognized that there are non-psychoactive cannabinoids. Basically, just about identical—just about identical molecules to THC that aren't psychoactive, but have all the other medicinal properties. There are 70 cannabinoids in marijuana. THC is the dominant one and it is psychoactive. So that the docs in my rule [*sic*] are doing these days is where it's recommending the cannabidiol rich strains or other strains that aren't particularly psychoactive. You don't get high basically, but you do get the medicinal effects so those products are coming to be available."

Forty-five percent of Hergenrather's patients used just marijuana, and 55 percent also used conventional medications. He explained that he also recommended "other commonly used immune-modulating medications or steroids in some cases to manage the flare-ups" of the disease. Ulcerative colitis, he said, is not a "steady state" disease, but is characterized by flare-ups and remissions, the mechanism of which is not really understood. "Stress," however, is "the single most significant problem in causing flare-ups . . . . A lot of people will say this food gives them trouble or that food gives them trouble, but the only thing that's consistent throughout is stress as a cause of aggravating condition."

Stine's motion was based in part on a claim that incarceration caused him more severe symptoms, apparently due to stress. His counsel interjected at one point during argument: "Mr. Stine is now indicating that even if the Court weren't to grant the use of marijuana while he's on probation, he could deal with that; it's just he can't do both in custody and not use marijuana."

In argument on the motion, Rajan cited a 15-pound weight loss since being in custody (not actually established), and the stress of being incarcerated as a cause of worsened symptoms. He urged the court to allow "small dosages many times a day," as recommended by Hergenrather, and suggested that the court could "effectively restrict how much he has at any time" by use of a search condition, imposing a possession limit of an ounce or less at any given time, and the threat of prosecution or probation revocation should Stine not comply.

Prosecutor Maya countered that he did not doubt Stine had the disease or that marijuana might alleviate symptoms, but his "real concern" was Stine's motivation. Citing financial reasons and the "avoidance of penal consequences," he was concerned that Stine was motivated "to really promote the Court adopting this method of treatment as opposed to alternative and traditional methods of treatment." Citing the current and 1995 convictions for drug dealing, and the expired medical marijuana card from 2005, Maya urged: "These things don't seem to me to be such a priority in his life . . . that they should provide a basis for him to avoid incarceration, which is essentially what the end result is going to be here." Maya added: "I also am very troubled by the fact he refused medication for a month. This is an individual who seemingly is trying to dictate the terms of how he's going to be treated. If this is such an awful affliction, which I believe it to be, I find it to be ludicrous that he would not seek some method of relief, even though it's not the preferred method of relief. [¶] So I just have lots of questions about Mr. Stine's motivation for making this request."

Ruling. Judge Mallach began her ruling with this query: "[I]s the suffering because [the defendant] has another motive or is the suffering because he has no other alternatives? That's the bottom line here.

"I . . . accept the sincerity of Mr. Rajan and I accept the sincerity of the [d]octor; I don't necessarily accept the sincerity of the defendant. And I think what is telling is the fact that when the defendant goes to see the doctor out of custody while he is apparently in some pain, he is not—he's not in the condition he's in right now and I think you have to say well, why is that? I appreciate you're saying it's stress and stress exacerbates the illness and I accept that. But I also think it's because the defendant—Mr. Maya said it more articulately than I'm going to. But essentially the defendant chooses not to take the medication because he wants to present himself in this fashion. And I think that—because he wants to use the marijuana.

"You know, and I will even accept the fact that maybe . . . the use of medical marijuana . . . relieves his symptoms better than the traditional medicine, but he's in the jail right now and the choices are traditional medicine and he's choosing not to avail himself of that even if there are side effects so I'm not sure how really rational that is." The judge also questioned how realistic it was to expect a probation officer to monitor daily "what dosage the defendant is taking of marijuana." Then, after rejecting Rajan's alternative suggestion that the court consider just electronic home monitoring, the judge added: "I'm a cynic, we'll call it like it is. I think Mr. Stine is fairly manipulative and I think Mr. Maya has it right. He chooses for—whether it's the best treatment or not, I'll leave to others, but he chooses to use the marijuana and he doesn't—I have not seen a pattern that's why I asked the doctor about the history of . . . the medication he's taken—if I'd seen a history of somebody who's literally gone through all of the medications and hasn't received relief from any of them, then we'd be a different situation. That's not what I'm seeing."

On the question of release on electronic home monitoring, the judge saw no basis for it, was "just s[k]eptical" about Stine's claim of "severe" pain and noted that, with custody credits, he was really only serving 90 days, not six months.

Analysis. Finding discretion under the *Lent* test to interfere with a probationer's CUA use of medical marijuana "does not mean that the court *must* impose an interfering condition, for *discretionary* action is, by definition, something permitted, not required."

(*Leal*, *supra*, 210 Cal.App.4th at p. 843.) Discretion is abused when the determination is arbitrary or capricious, or exceeds the bounds of reason, all of the circumstances being considered. (*Ibid*.) "The step-three exercise of discretion is vital in limiting medical use of marijuana, for it entails a unique balance of competing public policies. On one hand, the step-one conclusion that a defendant has CUA authorization implicates a voter-compelled policy that qualified patients be allowed to alleviate medical problems through the use of marijuana. On the other hand, the step-two conclusion that the relationship of that lawful use to the crimes the defendant committed, or his or her future criminality, raises a competing policy consideration: the need to rehabilitate the defendant and protect the public during his or her release on probation. The resolution of these competing policies necessarily requires weighing the needs of one against the other before deciding whether and how much to limit the lawful conduct." (*Id*. at p. 844.) "The requisite balancing contemplates a judicial assessment of medical need and efficacy based upon evidence: the defendant's medical history, the gravity of his or her ailment, the testimony of experts or otherwise qualified witnesses, conventional credibility assessments, the drawing of inferences, and perhaps even medical opinion at odds with that of the defendant's authorizing physician." (*Ibid*.)

Stine fails to show abuse of discretion. The court's skepticism or cynicism about the degree of his disease-related suffering and his motive for the motion was reasonably grounded in the record. His all-for-my-own-use medical marijuana defense at trial had featured him testifying to a fairly preposterous account of how he came to be parked in a high narcotics area of East Palo Alto with a digital scale, over $1,800 in marijuana packed in one-ounce bags, and wearing a bulletproof vest. The court could reasonably discount his credibility in general and view his testimony as manipulative.

While there was no dispute that Stine had ulcerative colitis, a serious disease, that disease is not static but is marked by flare-ups and remissions. The court had good reason to doubt the severity or even existence of recent ill effects Stine's counsel asserted. The extent of Stine's weight loss was never established, but was surely not the 20 pounds claimed by Rajan. Nor did any evidence support Rajan's claims of an allergic

reaction, hives, a growing cyst under one arm, him being "racked with pain" or suffering "extraordinary side effects," or even whether such effects could be attributed to the conventional drug Stine had taken for the week preceding the hearing. Hergenrather never testified to those things, and Stine did not testify at all. Hergenrather spoke of Stine having marked abdominal tenderness during his physical examination of him five week earlier, but he conceded that this was based on self-reports from Stine, whom the court reasonably felt was manipulative and not very credible.

Then there was the suspiciously manipulative decision by Stine not to take any conventional medication for the first four weeks of his incarceration. Hergenrather had testified that most of his patients used conventional drugs in addition to marijuana, and he would prescribe them for any of his patients during flare-ups.

No evidence beyond Stine's self-reporting to Hergenrather supported that he had tried using conventional prescription drugs for ulcerative colitis. Stine *told* Hergenrather that he had used "five different drugs," yet named only Asacol, and Hergenrather could not find mention of any of those drugs in the medical records, only references to antibiotics and pain relievers given for abdominal discomfort. Absence of the medical records surely, and reasonably, heightened the court's skepticism, for it would seem implausible that a prescription drug, if ordered, would not be mentioned. Interestingly, too, Stine's report of problems or complaints concerning conventional drugs were not of side effects, but that they did not relieve his symptoms (see fn. 4, *ante*). And while Stine did self-report getting good relief from smoking marijuana, there was no mention of his having tried any synthetic form of THC, the drug's psychoactive cannabinoid, which Stine's briefing notes is available in pill form. (*People v. Rigo* (1999) 69 Cal.App.4th 409, 413-414.) We do not suggest that Stine had to show that he had exhausted every available alternative to marijuana, but the record did not compel the conclusion that he had tried *any*. Even if the court was inclined to assume for sake of argument that Stine had tried Asacol for the previous week, the record does not establish his dosage, whether that dosage was at a therapeutic level, or whether he took it consistently.

The court's (and prosecutor's) concern about "motivation" was also supported by the record. Not only might Stine logically be motivated to get the euphoric high of THC in the marijuana, rather than use other drugs, but his motion sought immediate release on electronic home monitoring in order to use it. It was reasonable to conclude that he was leveraging a claimed urgent need for medical marijuana as a means to get out of jail, a situation we do not find in any reported decision.

No abuse of discretion is shown.

DISPOSITION

The order denying modification is affirmed.

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Kline, P.J.

We concur:

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Haerle, J.

_____
Richman, J.

A133781, *People v. Thomas Marshon Stine*